sentenced the appellants. I do not think that much need be said on the appeal against sentence except to point out that the learned trial judge had heard arguments on the matter and it has not been demonstrated that any relevant factors had not been borne in mind by the learned trial judge before he sentenced the appellants. In the circumstances the sentence cannot be said to be wrong in principle or excessive. Accordingly, I would dismiss the appeal against sentence.

Appeal dismissed.

Solicitors: *Thomas & Co.; Yong & Co.*

KONG POH ING v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and George Seah JJ.) June 13, 1977]

[Kuching — Federal Court Criminal Appeal No. 50 of 1976]

Criminal Law and Procedure — Murder — Defence of accident — Not adequately put to assessors.

The appellant appealed against her conviction for murder. The defence of the appellant was one of accident but this defence was not adequately put to the assessors. The assessors were not told that if they accepted the defence of accident, the appellant was entitled to be acquitted.

Held, allowing the appeal: as the defence of accident was not adequately put by the judge in his summing up there was a possibility that this might have led the assessors to take a wrong view of the law. It could not confidently be said on a proper and reasonable reading of the summing up that the assessors would have returned the verdict they did return, if they had been adequately directed on the defence of accident.

Cases referred to:-

(1) *R.* v. *Immer* 13 Cr. App. R. 22.
(2) *R.* v. *Frampton* 12 Cr. App. R. 202.
(3) *R.* v. *Brookes* 21 Cr. App. R. 112.
(4) *R.* v. *Ong Choon* [1938] M.L.J. 227.
(5) *Mensah* v. *R.* A.I.R. 1948 P.C. 20.
(6) *Ratnam* v. *R.* [1937] M.L.J. 222.

FEDERAL COURT.

Joseph Tang for the appellant.

Abdul Hamid bin Mohamed Yusof (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering the judgment of the Court, read by Lee Hun Hoe C.J. (Borneo)): We allowed the appeal against conviction on a charge of murder under section 302 Penal Code and set aside the sentence of death by hanging passed. We now give our reasons.

The person whom the accused was charged with murdering was her boy-friend whom under a promise of marriage she had allowed to seduce her. The prosecution could produce no eye witnesses to the incident. The evidence consisted largely of dying declarations allegedly made by the deceased before his death. These witnesses were all members of the deceased's family, who could not but be regarded as interested witnesses. The main and common gist of their evidence was that the deceased had said that the accused had stabbed him. Their accounts, however, varied, not only with one another, in the context of their evidence in court but also in at least two instances, when set against their depositions at the Preliminary Enquiry. One of these was a young lad, to whom an affirmation was not administered by reason of his tender age and who were merely warned to speak the truth. Both were allowed to be impeached. When the evidence of these several witnesses is compared, it is a matter of some uncertainty whether at the stabbing incident, the accused was accompanied by two others or whether she was alone. Some said she was not alone. Others failed to testify to the presence of her companions. This question is of great importance to the defence, which was that of accident and which will be dealt with later, but for the moment we note that there are at least two factors which bear greatly on the uncertainty of this evidence and on the failure to resolve it by a definite direction to the assessors. Firstly, the medical evidence raises some doubt whether at the relevant time the deceased had recovered sufficiently from the anaesthesia administered to him for the operation he had to undergo, to be able to utter the declarations in question. Secondly, there would appear to be at least two independent witnesses in the persons of the nurses attending on the deceased at this time. From their proximity to the deceased, they could not reasonably have avoided hearing what the deceased was alleged to have said, if he had said anything. These witnesses were not produced. Reliance was placed entirely on members of the deceased's family.

The other evidence against the accused consisted of her statement to the police which in the law in force in Sarawak at the relevant time was admissible in evidence against her. It proved that the stabbing was by her. The statement was reduced in writing. In it, she admitted to a desire to commit suicide, in the presence of the deceased. She wished to reproach him by this demonstration for his betrayal in now refusing to marry her. For this purpose she waited for him. She had brought with her a knife for the purpose she had in mind. When he came, she showed him the knife. Then according to her, he hugged her and told her not to die. There was an obvious attempt to wrench the knife away from her. They fell. He was stabbed. She ran away. This statement was introduced as part of the prosecution evidence, and raised for the first time the defence of accident.

The medical evidence was one stab wound that penetrated the stomach and jejunum and lacerated the abdominal aorta. Death was due to shock from massive haemorrhage. In the light of the defence put up, the fact that there was only one stab wound must assume some significance.

In her defence, which in our view and with respect, was rightly called, the accused testified on oath what she had said in her statement to the police. She gave her evidence in greater detail, and throughout her testimony, she maintained her reliance on accident.

The summing-up was in great detail. For the purpose of the appeal, it is sufficient to observe that the learned judge dwelt on intention to cause death as being one of the main ingredients of murder. He considered the possibility of the main charge of murder

being reduced to culpable homicide not amounting to murder or even to a conviction on a charge of voluntarily causing grievous hurt. He also mentioned that the defence was one of accident. He made this mention in one brief sentence. He went on to deal with this defence by reminding the assessors that all the accused had to do was to cast a reasonable doubt as to the truth of the prosecution case or as to her guilt, even though they did not believe the truth of her defence. If she succeeded in doing so, she would be entitled to be acquitted on the charge against her.

It might of course be argued that all in all, this summing-up satisfied the requirements that the defence be adequately put to the assessors, since they were told that the accused was entitled to an acquittal on the defence of accident if she was thought to have succeeded in establishing it on a balance of probabilities. Where the address is made to trained legal minds, it might be possible to accept such a submission but the assessors (and jury-men, for the matter) are all drawn from the general public and are untrained in law. Bearing this in mind, we cannot consider any summing-up as adequate which does not clearly, in simple language, and in words which they are capable of understanding, explain the issues fully to them. Where there is an area of misunderstanding, the summing-up cannot be regarded as satisfactory. That there is such an area in the present case is, with respect, clear, since immediately afterwards, the learned judge went on to say: —

"However, in such event, I shall be framing certain questions for you to consider at the end of this summing-up, as to whether, on the whole of the evidence including the defence and bearing in mind what I have just directed and reminded you as to the burden and standard of proof, you consider that the accused is guilty of the lesser offences of culpable homicide or of voluntarily causing grievous hurt."

Suffice it to say that on the questions framed for answer by the assessors, the verdict could only be guilty of murder, or of culpable homicide not amounting to murder or of voluntarily causing grievous hurt. There was no question whatsoever of acquittal on the defence of accident. There was not the slightest direction that accident, if accepted, must necessarily nullify any intention to cause death or bodily hurt.

It is a paramount principle of criminal law that a summing-up must fairly put the case for the defence before the jury: see, *inter alia*, *R.* v. *Immer*,[1] *R.* v. *Frampton*,[2] *R.* v. *Brookes*,[3] *R.* v. *Ong Choon*.[4] In *Mensah* v. *R.*,[5] the failure of the judge to take the opinion of the jury on the possibility of provocation reducing the charge of murder to one of culpable homicide not amounting to murder was held to justify the interference of the Privy Council on appeal, even though the point was raised for the first time in argument before it.

As the defence of accident was not dealt with adequately the possibility that the summing-up might have led the assessors to take a wrong view of the law could not be overlooked.

The case of *Ratnam* v. *R.*[6] is very much in point. The accused had stabbed his over-seer. He was charged with murder. During the trial, in answer to a question put by the judge, the appellant stated that he did not intentionally stab the deceased. His evidence was that the death was purely accidental. In his summing-up, the judge directed the jury that the whole case was whether the evidence by the defence was sufficient in their minds to reduce the charge from murder to culpable homicide not amounting to murder, on the grounds that the appellant was provoked, which was the suggestion by his counsel, or if they accepted his story, that he turned round with such force that the knife accidentally hit the deceased and that he had no intention of stabbing the deceased. The judge also directed the jury that the appellant must be guilty of either one of these two offences. The Court of Criminal Appeal quashed the conviction, holding that the judge had misdirected the jury in two aspects. First, if the jury had accepted the appellant's story that the fatal blow was unintentional and a pure accident, there would be no evidence to support a charge of culpable homicide not amounting to murder (and we would add, of voluntarily causing grievous hurt), as criminal intention had to be fully established as in murder. Secondly, the jury were not directed that if the offence of accident were accepted, the appellant was entitled to an acquittal. With respect, the same criticisms must be directed to the summing-up in this case.

In resisting the appeal, the learned Deputy Public Prosecutor attempted to argue that since suicide was a felonious offence, the accused's act of stabbing the deceased in the course of committing suicide, even if accidental, could not bring the offence within section 80 Penal Code. We do not think that section 80 Penal Code excludes the defence of accident from cases other than those in the circumstances therein mentioned. *Ratnam's case, supra,* is sufficient answer.

On a proper and reasonable reading of the summing-up, we cannot feel confident that if properly directed, the assessors would have necessarily returned the verdict they did return. For this reason, the appeal was allowed.

Appeal allowed.

Solicitors: *Tang & Co.*

SUNDANG TIMBER CO. SDN. BHD. v. KINABATANGAN DEVELOPMENT CO. SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Charles Ho JJ.) June 17, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 130 of 1976]

Contract — Illegality — Assignment of licence to extract timber — Agency agreement coupled with power of attorney — Forests Enactment, 1968, ss. 24(6) and 43(1).

Practice and Procedure — Effective law applicable — Date of contract, writ or trial.

Forests — Timber — Extraction — Contract — Forest Enactment, 1968, ss. 24(6) & 43(1).

Conservator — Conditions prescribed — Whether part of contract.

The appellants had been granted a special licence by the State Government of Sabah to extract timber. Subsequently